

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP839-CR

Cir. Ct. No. 2009CF122

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CURTIS E. FORBES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for
Columbia County: ALAN J. WHITE, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Curtis Forbes appeals his conviction for first-degree murder¹ and an order denying his motion for postconviction relief.² He challenges the admission of a statement obtained from his wife in alleged violation of the Fourth Amendment, and the exclusion of other acts evidence relating to an alternate suspect. We affirm on the ground of harmless error.

BACKGROUND

¶2 Marilyn McIntyre was discovered beaten, strangled, and stabbed to death in her home on March 11, 1980. Marilyn's husband, Lane McIntyre, suggested Forbes as a possible suspect, but police were unable to find any physical evidence linking Forbes to the crime and did not make any arrest at that time.

¶3 When the case was reopened in 2008, police questioned Forbes' wife Debra in the couple's home for approximately seven hours. The circuit court ruled that the interrogation violated the Fourth Amendment because the police did not have consent to be in the home, and their presence exceeded the scope of their warrant to collect a DNA sample from Forbes after Forbes had already been removed from the home. The circuit court initially suppressed Debra's entire interrogation, but later allowed one sentence from her statement to be used as impeachment evidence.

¹ The charge was "murder" rather than "homicide" because the offense was committed in 1980, when the 1979-80 version of the Wisconsin Statutes was in effect. All references in this opinion to the offense are to that version of the statutes, while all references to evidentiary rules are to the current 2011-12 version of the Wisconsin Statutes, which are unchanged in any material way since the time of trial.

² Although Forbes lists the postconviction order on his notice of appeal, the issues he raises before this court were all preserved during the trial and were not included in his postconviction motion.

¶4 The defense theory was that Lane McIntyre was the actual killer. The circuit court permitted Forbes to present some, but not all, of the evidence Forbes proffered to establish a pattern of domestic violence by Lane against Marilyn.

¶5 We will set forth more specific facts relating to the challenged evidentiary decisions in our discussion below.

STANDARD OF REVIEW

¶6 Most constitutional errors are subject to harmless error analysis. *State v. Martin*, 2012 WI 96, ¶44, 343 Wis. 2d 278, 816 N.W.2d 270. These include the admission of evidence obtained in violation of the constitution, *id.*, and the exclusion of evidence a defendant claims was necessary to his defense as a matter of due process, *State v. Kramer*, 2006 WI App 133, ¶26, 294 Wis. 2d 780, 720 N.W.2d 459.³

¶7 When the State claims that a constitutional error from which it has benefited in a criminal trial was harmless, it bears the burden of showing beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Martin*, 343 Wis. 2d 278, ¶45. In evaluating the prejudicial effect of the error, a court should consider such factors as

the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously

³ The State disputes Forbes' assertion that his challenge to the exclusion of domestic violence evidence presents a due process issue, arguing that we should evaluate the court's decision under the usual discretionary standard applicable to evidentiary decisions. We need not resolve that dispute, however, because we would reach the same result under either standard of review.

admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case.

Id., ¶46 (citing *State v. Mayo*, 2007 WI 78, ¶48, 301 Wis. 2d 642, 734 N.W.2d 115). Application of the harmless error doctrine presents a question of law subject to de novo appellate review. *Weborg v. Jenny*, 2012 WI 67, ¶43, 341 Wis. 2d 668, 816 N.W.2d 191.

DISCUSSION

Debra's "Blood" Statement to Police

¶8 When the police were questioning Debra in 2008 about her interactions with Forbes in the early morning hours of March 11, 1980, she made the statement, "He had a white shirt on underneath that blue sweater, and I saw blood there." We will assume without deciding that this statement should have been suppressed, and evaluate whether the State has established beyond a reasonable doubt that Forbes would have been convicted in the absence of the statement.

¶9 The frequency of the State's references at trial to Debra's having seen blood on Forbes' shirt supports the conclusion that the presence of blood on Forbes' shirt in the early morning hours after the murder was an important component of the State's case. The State did not, however, rely exclusively upon Debra's statement to police to establish that she had seen blood on her husband's shirt.

¶10 Lori Beattie testified that, about two weeks after the murder, Debra told Beattie that Forbes "had shown up at her parents' home" about 4:00 a.m. on

March 11 “wanting her to take care of his clothing” because “there was blood on his clothing.” Rick Dilley similarly testified that, following Marilyn’s funeral, he heard Debra saying that Forbes had shown up at her parents’ house at 4:00 a.m. on March 11, in an agitated state, with scratches on his back, and with a sweater that needed washing. After reviewing a transcript to refresh his recollection of what he had told police, Dilley further testified that Debra “probably said that there was blood on the sweater.” Cynthia Lawson also testified that, a few weeks after the murder, Debra told her that Forbes had shown up at her parents’ house about 4:00 a.m. and that Debra’s mother had washed Forbes’ clothing.

¶11 In addition, the State introduced testimony about—and played the actual recording of—a phone call between Debra and Forbes while he was in jail following his arrest in the reopened investigation. During the conversation, Forbes asserted that he had not murdered Marilyn. In response, Debra asked, “Then where’d the bloody shirt come from?” Forbes replied that he could “explain all that,” but would not do so on the phone. Thus, the challenged evidence that Debra told police she had seen blood on Forbes’ shirt in the early morning hours after the murder was duplicated and corroborated by other untainted evidence from three other witnesses to whom Debra had told much the same thing and by the recorded conversation between Debra and Forbes.

¶12 Furthermore, although the evidence that Forbes had blood on his shirt in the early morning hours after the murder was certainly significant, it was by no means the only evidence the State had tying Forbes to the murder. Some of the most important evidence in the case came from four witnesses who testified about incriminating statements Forbes had made over the years.

¶13 Mary Bailey testified that one of her former boyfriends told her in 1982 that a guy named “Curt” had bragged about “getting away with murder.” Bailey, who had also previously dated Forbes, “put it together” that “Curt” was Forbes.

¶14 Gary Bednar testified that, one evening in 2001 or 2002, after Forbes asked about Bednar’s prior conviction for reckless homicide, Forbes told Bednar that Bednar just did not “know how to do it and get away with it.” Forbes then related to Bednar how Forbes had once given his wife’s friend a ride home from a bar; “fucked her ... [while] she was saying ‘no,’ but he knows that she meant yes;” then beat and choked her to death and got away with it by leaving the country for a couple of years. Bednar’s wife Laura testified that she overheard part of the conversation, including Forbes telling her husband that he did not know how to get away with killing someone, and a comment that “that’s the last time that bitch will need a ride home.”

¶15 Shane Thompson, who had served time in the same cellblock with Forbes in the Columbia County jail, testified that Forbes had talked to him about Forbes’ case and how the detectives were too dumb to see what really happened. Forbes told Thompson that Forbes had gone to see a woman because she had threatened to tell his wife that he was cheating on her. Forbes said he got into an argument with the woman, and that he “took care of the problem” by strangling and stabbing her “in overkill.” Forbes also told Thompson, “sometimes bitches just deserve to die,” and that “dead people can never get you in trouble unless you mess up and leave evidence behind.”

¶16 The State produced additional evidence to show motive and knowledge of guilt. As to motive, two women testified that Forbes had made

unwanted sexual advances toward them in the days before the murder, and had become angry and physically aggressive when turned down. As to knowledge of guilt, the State presented evidence that shortly after the murder, Forbes took \$2,000 from his brother's business and drove Debra's car to Kenosha, then made his way to Chicago, then to Louisiana and Florida. Also, after police exhumed Marilyn's body, Forbes purchased a rubber raft, which Debra told Forbes' mother Forbes planned to use to fake his death.

¶17 In sum, the State built a strong circumstantial case against Forbes based largely upon his own behavior and statements. As we will discuss more fully below, the defense pursued a two-fold strategy of questioning the motivations, credibility, and memories of the State's witnesses, while attempting to challenge the timeframe of the murder and cast suspicion on the victim's husband, Lane, as the killer. Given the nature of the State's case and the defense, we are satisfied beyond a reasonable doubt that a jury would have reached the same verdict even without knowing that Debra told police about seeing blood on Forbes' shirt after the murder.

Evidence of Lane's Abusive Behavior

¶18 Forbes filed a pretrial motion seeking to admit evidence pursuant to *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984), to show that Lane was a viable alternate suspect with motive, opportunity, and proximity to the crime. The circuit court allowed Forbes to present evidence that neighbors had heard frequent fighting between Lane and Marilyn; that on March 8, 1980, Lane called Marilyn a "whore," dragged her to a driveway by the hair, struck her in the face knocking her down, and kicked her between her legs as she attempted to crawl away; that on the evening of March 10, the neighbors heard a loud racket

and a loud voice they recognized as Lane's coming from Lane and Marilyn's apartment; that Lane was the last person known to have seen Marilyn alive and the one to find her dead; that there was no sign of forced entry to the apartment; that the murder weapon was a knife from the McIntyres' kitchen; that Lane put March 10 as the date of death on Marilyn's tombstone; and that the medical examiner had provided a twenty-four hour window for the crime.

¶19 The circuit court disallowed four other pieces of proffered *Denny* evidence that it deemed too remote or irrelevant under an apparent *Sullivan* analysis: that Lane had beaten Marilyn during a Christmas party in 1979; that Lane had punched a hole through a wall following an altercation with Marilyn outside a bar that had occurred prior to their marriage; that Lane had grabbed his second wife by the throat during an argument and lifted her against a wall; and that Lane told police that the reason for the incident with the second wife was that he was the man of the house. *See generally State v. Sullivan*, 216 Wis. 2d 768, 576 N.W.2d 30 (1998) (discussing admission of other acts evidence).

¶20 Forbes acknowledges that it is proper to employ a *Sullivan* analysis to consider the relevance of proffered *Denny* evidence that includes a third party's "other acts." *See State v. Scheidell*, 227 Wis. 2d 285, 294-95, 300, 595 N.W.2d 661 (1999) (applying *Sullivan* test to other acts by unknown third party); *see also State v. Oberlander*, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989) (applying WIS. STAT. § 904.04(2) relevancy test to other acts committed by known third party). Because *Scheidell* implies that an analysis under *Sullivan* is appropriate under the circumstances and because Forbes agrees this is appropriate, we apply *Sullivan*.

¶21 Forbes argues both that the circuit court misapplied the *Sullivan* test and that the exclusion of the other acts evidence deprived him of his due process right to present a defense. *See generally State v. Pulizzano*, 155 Wis. 2d 633, 456 N.W.2d 325 (1990) (a defendant’s constitutional right to present a defense may in some cases require the admission of testimony that would otherwise be excluded under applicable evidentiary rules); *see also State v. Jackson*, 216 Wis. 2d 646, 663, 575 N.W.2d 475 (1998). We do not find either contention persuasive.

¶22 As to the circuit court’s *Sullivan* analysis, Forbes does not contend that the circuit court applied an erroneous standard of law by considering relevancy or misstated the facts as to the alleged other acts. Rather, Forbes simply disagrees with the circuit court’s assessments that: the Christmas party and bar incident were too remote; that the incident with the second wife was irrelevant because it occurred after the murder; and that Forbes’ reference to being the man of the house was indicative of his character, rather than relevant to an admissible purpose such as showing identity. We are satisfied that the circuit court’s discussion of each excluded piece of evidence represents a sound exercise of discretion.

¶23 As to whether the exclusion of the evidence deprived Forbes of his constitutional right to present a defense, the standard for obtaining a new trial requires a showing that the alleged due process violation “completely” prohibited the defendant from exposing a witness’s bias or motive for testifying falsely, or deprived the defendant of material evidence so favorable to his defense as to “necessarily” prevent him from having a fair trial. *See United States v. Manske*, 186 F.3d 770, 778 (7th Cir. 1999); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); *see also Jackson*, 216 Wis. 2d at 656-57 (right to present a defense is not absolute but rather limited to relevant evidence not substantially

outweighed by prejudicial effect); *State v Heft*, 185 Wis. 2d 288, 303, 517 N.W.2d 494 (1994) (defendant was not deprived of “the opportunity to present a complete defense”). We conclude that Forbes was reasonably permitted to present his defense that Lane had committed the murder because Forbes was allowed to present testimony about Lane’s arguments with and violence toward Marilyn near the time of the murder, and other evidence that Lane had the means and opportunity to kill his wife.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

